

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
VARIANCE PERMIT ISSUED BY MASON  
COUNTY TO RODRIK NILSSON, and  
APPROVED BY WASHINGTON STATE  
DEPARTMENT OF ECOLOGY,

G.S. and M.L. HOUGHTON,  
Appellants,

v.

MASON COUNTY, RODRIK NILSSON,  
and STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondents.

SHB No. 84-56

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of a shoreline variance approval for a fence on Hoods Canal, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, presiding, Gayle Rothrock, Wick Dufford, Rodney M. Kerslake, Nancy R. Burnett, and Robert Schofield, Members, on March 4, 1985, at Shelton, Washington. The proceedings were officially reported by Lisa Flechtner.

1 Appellants G.S. and M.L. Houghton represented themselves.  
2 Respondent Mason County was not represented. Respondent Department of  
3 Ecology was represented by Assistant Attorney General Allen T. Miller,  
4 Jr. Respondent Rodrik Nilsson was represented by Attorney Brooke  
5 Taylor.

6 Witnesses were sworn and testified. Exhibits were admitted and  
7 reviewed and oral argument was heard. From the testimony, evidence  
8 and argument the Board makes these

9 FINDINGS OF FACT

10 I

11 The subject development is a 6 x 30 foot long fence located in  
12 Mason County on the west shore of Hood Canal approximately two-thirds  
13 of a mile south of Lilliwaup. The Mason County Shoreline Master  
14 Program (MCSMP) designation of the area is urban; Hood Canal itself is  
15 a shoreline of statewide significance as designated in the Shoreline  
16 Management Act (SMA). Lots in the area are developed, with permanent  
17 and vacation residences.

18 II

19 Respondent Rodrik Nilsson seeks approval from the Shorelines  
20 Hearings Board of a variance granted by Mason County and the  
21 Department of Ecology for a fence which they built without a permit.  
22 The fence is solid, measures 6 feet x 30 feet and is constructed of  
23 cedar. It is located along the boundary between the Nilsson beach  
24 property and a county parking area to the north. The fence is located  
25 within the fifteen-foot setback from the line of ordinary high water

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
SHB No. 84-56

1 and does cause some view blockage to appellant, Houghton.

2 III

3 Respondent Nilsson and his family have owned and used the property  
4 since 1979. It consists of 215 feet of waterfront on which they have  
5 replaced the original bulkhead with a substantial new one, have added  
6 approximately 400 yards of fill to restore the uplands, and have  
7 restored and added onto the older home located on the property, all  
8 with appropriate permits. The county property consists of landfill  
9 behind rock rip-rap along the beach, forming a public parking lot  
10 which provides public parking and access to the beach, and is  
11 typically used by the public, as well as the Houghtons and their  
12 neighbors, to park automobiles, boats and trailers. Because of the  
13 fill added by the County for construction of the public area, the  
14 elevation of the parking lot is unnaturally high, and above that of  
15 the Nilsson property.

16 IV

17 On May 8, 1984, respondent Nilsson applied for an "after the fact"  
18 substantial development permit and variance for the subject fence.  
19 The purpose of the fence according to respondent Nilsson is to; (1)  
20 provide both a physical and visual screening of his property from the  
21 public parking lot; and (2) discourage trespassing by the public on to  
22 respondent Nilsson's beach property.

23 V

24 On July 24, 1984, the Mason County Shorelines Advisory Board  
25 declined to advise the commissioners on respondent Nilsson's

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
SHB No. 84-56

1 application for a variance. On August 27, 1984 the Mason County  
2 Commissioners granted the variance application. On September 24,  
3 1984, the Department of Ecology approved the variance.

4 VI

5 Feeling aggrieved by the decision, the appellants requested review  
6 by this Board on October 24, 1984. On November 16, 1984, the request  
7 for review was certified by the Department of Ecology. A pre-hearing  
8 conference was held on November 30, 1984.

9 VII

10 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
11 adopted as such.

12 From these Findings the Board comes to these

13 CONCLUSIONS OF LAW

14 I

15 The Shorelines Hearings Board reviews applications for shoreline  
16 permits de novo, conscious, of course, that the burden of proof is on  
17 the appellant in this case. The question to be decided by this Board  
18 is: Is the 6' by 30' long fence, already constructed, consistent with  
19 the Shoreline Management Act (SMA) and the Mason County Shoreline  
20 Master Program (MCSMP), particularly the variance criteria adopted  
21 pursuant thereto.

22 II

23 The major policy considerations of the Shoreline Management Act of  
24 1971 are set forth in RCW 90.58.020. Two major policy considerations  
25 are set forth in different portions of this section of the statute, as  
26 follows:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

• • •

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

## III

The Shoreline Management Act does not require that there be a compensating public benefit to offset the private benefits from every development permit which is issued, but simply requires that the public interest be considered in the processing of permits for any shoreline development. Portage Bay-Roanoke Park Community Council v. The Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979). In that case, the Washington Supreme Court upheld a decision by the Shorelines Hearings Board allowing the issuance of a permit for a floating walkway and services facility for eight houseboats.

The screening fence constructed by Nilssons does minimum damage to the ecology or environment of the subject shoreline area, and does not interfere with the public's use of the waterfront. This County "park"

1 provides the public with parking facilities, and direct access to Hoo-  
2 Canal. Although it may have been easier for neighbors and visitors to  
3 the park to trespass on Nilsson's property to gain access to the water  
4 the Board believes they had no right to do so.

#### 5 IV

6 The Mason County Shoreline Master Program (MCSMP), Section  
7 7.20.010 deals with development within the 15 foot setback. It reads  
8 as follows:

9 Setbacks - the minimum setback for buildings  
10 shall be 15 feet from the line of ordinary high  
11 water, provided that structures shall not extend  
12 beyond the common line of neighboring structures, and  
new construction shall not substantially reduce the  
view of neighboring structures. (Section 7.20.010(c).

13 The fence is not set back fifteen feet from the line of ordinary  
14 high water; therefore it requires a variance if it is to comply with  
15 the (MCSMP).

#### 16 V

17 The MCSMP allows variances to be granted under the following  
18 conditions:

19 Variances deal with specific requirements of this  
20 ordinance and the objective is to grant relief when  
21 there are practical difficulties or unnecessary  
22 hardships in the way of carrying out the strict  
23 letter of this ordinance. The property owner must  
24 show that if he complies with the provisions, he  
cannot make any reasonable use of his property. The  
fact that he might make a greater profit by using his  
property in a manner contrary to the intent of the  
ordinance is not a sufficient reason for a variance.  
A variance will only be granted after the applicant  
can demonstrate the following:

25 A) The hardship which serves as a basis for the  
26 granting of a variance is specifically related to the

1 property of the applicant.

2 B) The hardship results from the application of  
3 the requirements of the Shoreline Management Act and  
4 this ordinance, and not from, for example, deed  
5 restrictions or the applicant's own actions.

6 C) The variance granted will be in harmony with  
7 the general purpose and intent of this ordinance.

8 D) Public welfare and interest will be  
9 preserved; if more harm will be done to the area by  
10 granting the variance than would be done to the  
11 applicant by denying it, the variance will be  
12 denied. MCSMP Section 7.28.020.

## 13 VI

14 The only reasonable use of the Nilsson beach is for recreation.  
15 On private residential property this use includes an entitlement to  
16 certain qualitative values expressed in the term quiet enjoyment. In  
17 this sense, without the fence, the only reasonable use available to  
18 respondent and his family is effectively precluded.

## 19 VII

20 The first requirement of the variance criteria (A), is met because  
21 the beach in question is in full view of the adjacent public parking  
22 area and provides more attractive access to the water than is  
23 available in the County "park." Respondent Nilsson built a fence in  
24 the setback area in response to these physical realities to protect  
25 his privacy and prevent the public from trespassing on his beach from  
26 the public property next door. In other words, without the fence  
27 respondent Nilsson would suffer a hardship not of his making.

## 28 VIII

29 The second requirement of the variance criteria (B) is met because  
30 the hardship (no structure within the fifteen-foot setback) is  
31 directly imposed by the MCSMP.

IX

The third requirement of the variance criteria (C) is met because the general purpose and intent of the MCSMP (variance procedure) is "...to grant relief when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance." This Board believes that this quoted objective would be served by the granting of the variance requested by the Nilssons.

X

The fourth requirement of the variance criteria (D) is met because the Board believes that more harm would be done to the applicant by denying it than would be done to the public by granting it. However, we wish to emphasize that this decision rests entirely on its unique facts and cannot serve as a precedent for future beach fences. The compartmentalizations of the shorelines by a series of barriers between lots on a broad scale would be lamentable eventuality--one which is certainly not envisioned in either the SMA or the MCSMP. We wish to provide no encouragement for other developments of this kind.

XI

All MCSMP variance criteria must be met before a variance may be granted. Appellants have failed to show that the subject fence does not meet all the variance criteria. Accordingly, Mason County's granting of the variance should be affirmed.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

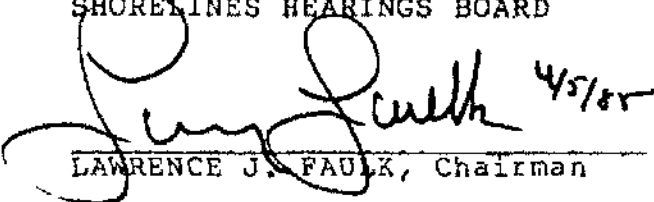


ORDER

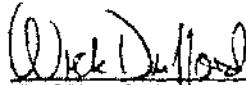
The instant variance application decision by the Mason County Commission is affirmed.

DATED this 11<sup>th</sup> day of April, 1985.

SHORELINES HEARINGS BOARD


 4/5/85  
LAWRENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice Chairman

  
WICK DUFFORD, Lawyer Member

  
RODNEY M. KERSLAKE, Member

  
NANCY R. BURNETT, Member

  
ROBERT SCHOFIELD, Member